A **ALLIANZ GENERAL INSURANCE MALAYSIA BERHAD**

v.

MAXI DEVELOPMENT SDN BHD & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[CIVIL SUIT NO: 22C-33-07-2013]
16 OCTOBER 2013

C ***CIVIL PROCEDURE:*** *Res judicata - Abuse of process of court - Fresh evidence - Whether material already tendered in earlier proceedings - Whether evidence tendered to impugn earlier suit - Whether plain and obvious case for striking out - Whether abuse of process of court - Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c) & (d)*

D ***EVIDENCE:*** *Fresh or further evidence - Principles applied - Whether conditions for admissibility satisfied - Whether evidence already tendered in earlier proceedings - Whether evidence tendered to impugn earlier suit - Whether relevant for consideration*

E A landslide which occurred at the slope of neighbouring property had caused damages to certain units in the Casa Vinca Apartments residential project, including the units owned by the defendants. Subsequently, Majlis Perbandaran Langkawi ('MPL') issued a demolition notice ordering certain buildings of the Casa
F Vinca Apartments to be demolished as it was of the view that they were dangerous and unsafe to the occupiers. The order included the defendants' properties, which were insured with the plaintiff under a fire "Insurance Master Policy". The defendants filed a claim with the plaintiff under the policy but the plaintiff
G proposed rectification or reinstatement works instead of demolishing the properties. Following meetings between the parties, reinstatement works were carried out and a certificate of practical completion was issued. However, the defendants refused to take possession of the properties and/or to occupy them
H claiming that the affected properties remained unsafe and structurally unstable and that the reinstatement works had been carried out without MPL's approval and while the demolition notice was still in force. The defendants insisted on payment under the insurance policies to which the plaintiff refused. Hence,
I the defendants filed a suit ('2005 Suit') premised on the allegations of breaches of the insurance policy and for defective rectification or reinstatement works. The defendants' claim was allowed by the

High Court and subsequently upheld on appeal. Leave to appeal to the Federal Court was refused on 20 June 2013. However, in view of a subsequent revocation of the demolition notice by MPL on 4 June 2013, the plaintiff sought declaratory orders to declare that the plaintiff was not liable to satisfy the judgment in the 2005 Suit. Alternatively, the plaintiff sought a repayment of the cost of reinstatement that it had incurred. It was the plaintiff's argument that the instant claim was predicated on fresh evidence whereby the revocation of the demotion notice was a "crucial piece of fresh evidence" which was never before the court in the previous proceedings and as a matter of law, a fresh action lie for appropriate relief to be granted. On the other hand, the defendants sought to strike out the plaintiff's claim under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 as the matter was *res judicata*.

Held (striking out plaintiff's claim):

(1) Justice demands that there is finality in litigation and the courts have a responsibility to prevent abuse of its process by checking such actions as presented in this case. The principle of *res judicata* precludes all parties from "re-agitating in subsequent proceedings a complaint or an issue that has ... been disposed in earlier proceedings between the same parties ...". In the present case, the material which the plaintiff sought to adduce was the very same material which the plaintiff pivoted and pitched its case in its application for leave at the Federal Court. Thus, the doctrine of *res judicata* is engaged. (para 33)

(2) The plaintiff's intention was to not only revisit but also to impugn the decision in the 2005 Suit. It could not lie in the face of the plaintiff to say that it only had the potential of affecting the decision when that was the very object of the whole exercise. The very complaint of the plaintiff was about what it perceived as having to pay out twice; and the plaintiff wanted to be alleviated from that order of the court. (para 35)

(3) The properties were reinstated in 2004. The matter as to whether the demolition notice had been retracted or withdrawn was already in the forefront of the plaintiff's case and under scrutiny of the court even in the 2005 Suit. Yet, the plaintiff did not see it fit to procure the letter. Hence, the plaintiff had not been diligent in procuring the letter. In any case, the court in the 2005 Suit had rejected the contention when it found no evidence in support. (para 36)

(4) The conditions for fresh evidence were not satisfied wherein the letter did not seek to revoke the demolition notice with effect from the date of its issuance *ie*, 23 December 2003. The letter sought to revoke the notice with effect from June 2013 and therefore, it could not be evidence for the case in June 2003; or even evidence that was relevant for consideration. (para 37)

(5) This was a plain and obvious case to be struck out as the plaintiff's case was obviously unsustainable and would be an abuse of process of the court if allowed to proceed. (para 38)

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Jagindar Singh & Anor v. Tara Rajaratnam [1986] 1 LNS 116 HC ***(refd)***

Ladd v. Marshall [1954] EWCA Civ 1 ***(refd)***

Lau Foo Sun v. Government of Malaysia [1970] 1 LNS 56 FC ***(refd)***

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 96

Rules of Court 2012, O. 18 r. 19 (1)(a), (b), (c), (d)

For the plaintiff - TH Liew (Lim Qi Si with him); M/s TH Liew & Partners
For the defendants - CM Wong (KF Low with him); M/s KF Low & Co

Reported by S Barathi

JUDGMENT

Mary Lim J:

[1] This case arises from a decision in another case, both however, emanate from the same material facts. Those facts are to be found in the decision of Her Ladyship in Kuala Lumpur High Court Civil Suit No: D2-22-1372-2005 ("the 2005 Suit") which involved the same parties. In that case, the parties here were the opposing warring parties.

[2] In summary, this is what happened. The defendants are owners of certain units in a residential project known as "the Casa Vinca Apartments" in Kuah, Langkawi. Sometime in 2003, two landslides occurred at the slope of a neighbouring property causing damage to certain units in the Casa Vinca Apartments. The retaining wall and various parts of the properties were damaged to varying degrees.

[3] The consultants who designed the Casa Vinca Apartments inspected the damaged units and other parts of the properties which had been similarly damaged. Upon inspection, these consultants recommended that various units including the defendants' units to be demolished and to be rebuilt. Around the same time, the local municipal council, that is, Majlis Perbandaran Langkawi ('MPL') issued a demolition notice dated 23 December 2003 ordering certain buildings of the Casa Vinca Apartments to be demolished as it was of the view that they were dangerous and unsafe to the occupiers. The order included the defendants' properties.

[4] The defendants' units were insured with the plaintiff under a fire "Insurance Master Policy". After obtaining quotations from the relevant consultants, the defendants filed a claim with the plaintiff under the insurance policy. In dealing with the defendants' claims, the plaintiff proposed rectification or reinstatement works instead of demolishing the properties. Meetings were held between the parties to discuss these options. Representatives from MPL attended those meetings.

[5] The issue of a retraction or revocation of the demolition notice was discussed in those meetings. MPL was prepared to consider such retraction or revocation if the plaintiff was prepared to guarantee that the affected units be reinstated properly and safely and "that the concept of the protection of public interest is to be adopted and given paramount consideration". This proposal was finally agreed to by the defendants upon terms.

[6] Reinstatement works to the value of RM328,440 were carried out and a certificate of practical completion was issued. However, the defendants claimed that those works were not properly carried out and that the affected properties remained unsafe and structurally unstable. The defendants also asserted that the reinstatement works had been carried out without MPL's approval and while the demolition notice was still in force. The defendants refused to take possession of the properties and/or to occupy them. Instead, they insisted on payment under the

insurance policies to which the plaintiff refused. The 2005 Suit was filed and it was premised on allegations of breaches of the insurance policy and for defective rectification or reinstatement works.

[7] After a full trial where oral testimonies were led by all parties, the court allowed the defendants' claim. One of the issues that arose in that suit was whether the demolition notice issued by MPL had been revoked on 18 February 2004. This question was also related to the plaintiff's contention that the rectification or reinstatement works were an appropriate way to deal with the matter. The validity of the certificate of practical completion was also examined.

[8] In her decision, Her Ladyship *inter alia* found that there was damage to the properties; that there was no withdrawal of the demolition notice; that there was an "agreement of sorts between the parties in an attempt to get out of the impasse", and that the defendants agreed to the "suggestion to repair but subject to 14 conditions". One of those conditions was the requirement of compliance "with all relevant written laws, rules, orders, regulations or bylaws - in relation to the repair works".

[9] In dealing with the question as to whether the repairs had been properly done, the court found first that there was non-compliance of the Street, Drainage and Building Act of 1974 and the Uniform Building By-laws of 1984 and that the certificate of practical completion was invalid. It also found "on a totality of all the evidence adduced" that the defendants had proved its case on a balance of probabilities that the affected units were damaged as claimed; and that such damage was covered under the relevant insurance policies.

[10] Insofar as the quantum was concerned, the court allowed the defendants' claim for special damages of RM1,386,200 for the purpose of demolishing and reinstating the affected units, interests and costs. This was on 18 June 2010.

[11] This decision was upheld on appeal. Leave to appeal to the Federal Court was refused on 20 June 2013. Consequently, it goes without saying that the plaintiff is required to satisfy the judgment ordered in the 2005 Suit.

[12] On 4 June 2013, MPL revoked the earlier demolition notice with immediate effect. The plaintiff claimed that such a revocation must necessarily mean that the MPL "was satisfied that the

affected units or properties had been properly and safely rectified and did not expose nor where they capable of exposing any person or thing to any risk of injury or damage and they were and are accordingly safe and fit for occupation". The plaintiff contended that the effect of the letter meant that it should not be liable to pay any costs of demolishing and rebuilding the affected units. The plaintiff sought declaratory orders to that effect in these proceedings.

[13] According to the plaintiff, the withdrawal of the demolition notice was not before the court throughout the 2005 Suit proceedings. That meant that the court never took the withdrawal of the demolition notice into consideration as "formal evidence in making and maintaining the judgment ordering the plaintiff to make payment of the costs of demolishing and rebuilding Blocks B and C. With the withdrawal of demolition notice, the defendants should not be entitled to insist on demolishing and rebuilding Blocks B and C. By insisting on being paid the demolition and rebuilding costs all over again when there is no requirement to demolish and rebuild on view of the withdrawal of the demolition order, the defendants would be unjustly and inequitably enriched when payment is made". The plaintiff argued that the defendants "should not be allowed to use or otherwise abuse the process of the court to gain an unjust and inequitable enrichment".

[14] In real terms and in effect, the declaratory order sought in the present action seeks to declare the plaintiff as not being liable to satisfy the judgment in the 2005 Suit. Alternatively, the plaintiff sought a repayment of the costs of reinstatement that it had incurred. To this end, the plaintiff cited various instances of the defendants' conduct in support, basically to say that the defendants sanctioned the rectification works as it "stood by and permitted the rectification works to be carried out and completed".

[15] Aside from this, the plaintiff's argument is that its present claim is predicated on fresh evidence. The 4 June 2013 letter from MPL which revoked the demolition notice is described as a "crucial piece of fresh evidence" which was never before the courts in the previous proceedings. As a matter of law, a fresh action is said to lie for appropriate relief to be granted. Learned counsel for the plaintiff also submitted that the present action is not legally invalid. He claims on behalf of his client that as a matter of fact, there is substantive evidence to sustain it. The decision of *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143 was cited in support as justifying the present course of action.

[16] Meanwhile, the defendants have filed an application for the plaintiff's claim to be struck out under O. 18 r. 19 (1)(a), (b), (c) and (d) of the Rules of Court 2012. The defendants argued that the matter was *res judicata* and that the claim ought to be struck out for the reasons found in r. 19(1)(a) to (d).

[17] In the face of two competing applications, that is the application for an interim injunction and the other to strike out the claim, it is not only appropriate but it makes good sense that the court deals with the second application first; even if that was filed later.

[18] The law on the striking out of claims etc under O. 18 r. 19(1) of the Rules of Court 2012 is trite. The Supreme Court in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 has unequivocally held that the court should only allow this summary process in plain and obvious cases "when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'".

Res Judicata & Fresh Evidence

[19] Relying on the Supreme Court's decision in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, the defendants have invoked the doctrine of *res judicata*. Having examined the cause papers before the Federal Court, especially the affidavit filed in support of the application for leave to appeal under s. 96 of the Courts of Judicature Act 1964 (Act 91); and having seen the submissions, the defendants pointed out that MPL's letter was in existence at the time of the application before the Federal Court. Despite having heard counsel and having seen the papers (including the recent letter from MPL) which are premised on the same arguments as presently made, the Federal Court was not persuaded to grant leave. The doctrine of *res judicata* applies to prevent abuse of court process and re-litigation of the matter.

[20] In response to the issue of *res judicata*, the plaintiff's short answer is that the principle is not engaged here because this fresh piece of evidence was never considered and determined by the court in the earlier proceedings. In those proceedings before the Federal Court, the test was one under s. 96 of the Courts of Judicature Act 1964, whether leave to appeal ought to be granted; and not about fresh evidence. There is therefore no re-litigation.

[21] In the matter of fresh evidence, the plaintiff argued that there are three conditions that must be fulfilled. This was established in the case of *Lau Foo Sun v. Government of Malaysia* [1970] 1 LNS 56 which applied the principles laid down in *Ladd v. Marshall* [1954] EWCA Civ 1. Those conditions being, first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; that the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and finally, that the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.

[22] In his arguments, learned counsel of the plaintiff sought to distinguish the case of *Jagindar Singh & Anor v. Tara Rajaratnam* [1986] 1 LNS 116; [1988] 2 MLJ 607 where the court struck out the new action as the fresh evidence did not satisfy the third condition mentioned above. He argued that where the plaintiff is able to satisfy all three conditions, then the court must allow the plaintiff's claim to proceed to trial as the issue raised is serious.

[23] The plaintiff contended that all three conditions have been fulfilled here. First, the letter could not have been obtained with reasonable diligence for use at the trial as it was issued by MPL. It did not exist at the time of the trial and there was nothing the plaintiff could do to compel its issuance.

[24] Next, the plaintiff viewed the letter as one which will most probably have an important and definite influence over the result of the case. It is not only decisive but is said that it will change the entire result of the decision if it was available and had been considered by the trial court in the 2005 Suit.

[25] Thirdly, the plaintiff argued that the creditability of the withdrawal of the demolition notice cannot be doubted. Learned counsel contended that it behooves on the court to adjudicate on the letter if its credulity is not in doubt. The letter deserves adjudication and the court must allow the matter to run its course.

[26] On the basis that the three grounds are satisfied, and that this fresh action is legally initiated, the plaintiff argued that the application to strike out must necessarily fail. It is not a plain and obvious case that the plaintiff's claim is obviously unsustainable. The plaintiff should be allowed to run its case and have the relevance and weight of the letter from MPL tested and evaluated in evidence in order to see if the decision in the 2005 Suit can still stand or be maintained.

Findings

[27] Recently, the Federal Court had occasion to address this matter of fresh evidence and how earlier decisions of the court or the subject matter may be relooked at in the case of *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673, 696. In reaffirming its earlier decision in *Hock Hua Bank*, the Federal Court reminded that:

> Although both the courts below had referred to the cases of *Ling Kuok Teck & Anor v. Tseng Choon Chin @ Tay Bak Hui & 5 Ors* [1995] 3 CLJ 889 and the *Hock Hua Bank Bhd* (*supra*) which cases involved applications to impeach perfected judgments previously obtained on the grounds of fraud or non-disclosure of material documents, both the courts unfortunately missed to observe that in both cases **fresh actions** were filed to trash out the issue of fraud. In fact, Chang Min Tat FJ speaking for the Federal Court in the latter case, clearly stated that a "fresh action will lie to impeach the original judgment", and that the court had "no power under any application in the same action to alter, vary or set aside a judgment regularly obtained". (emphasis added)

[28] The plaintiff is therefore right when it submitted that a fresh action is required to relook the matters in the 2005 Suit. To that extent, its action is correct and this is consistent with of the Federal Court's observations in *Serac Asia* as set out above. However, whether this fresh action is plagued by problems of duplicity, *res judicata* are matters properly and appropriately taken up by the defendants in their application.

[29] From the papers related to the application for leave to appeal to the Federal Court, it is fairly evident that the plaintiff was attempting to make its case under s. 96 of the Courts of Judicature Act 1964 by referring to the letter recently issued by MPL. This letter was in fact exhibited in support of its application as exhibit "JK-2" and was referred to in the plaintiff's written skeletal submissions before the Federal Court. Relying on this letter, the plaintiff argued that:

> Thus any complaint by the Respondents that the reinstatement work did not have approval from LMC and the Demolition Order therefore remained effective cannot now be sustained.

[30] The plaintiff went on to say that it was "against this factual matrix that as set out in the overall introductory remarks above that the applicant comes before this Honourable Court to seek justice to be done". The plaintiff added that "on the facts and particularly the recent development in terms of the withdrawal of

the demolition order, the judgment against the applicant to pay for another round of work to Blocks B and C obviously cannot withstand judicial scrutiny". A

[31] It can further be seen that the plaintiff went on to develop its arguments on this. And it can be seen that the matters related to the letter are all current events that happened long after the case had been decided not only by the High Court but by the Court of Appeal. B

[32] The Court of Appeal in *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321 explained that the doctrine of *res judicata* was not a rule of pleading but was a principle "of substantial justice". When applied, it "precluded parties from re-agitating in subsequent proceedings a complaint or an issue that has, or could have fairly have been disposed in earlier proceedings between the same parties or their privies". C D

[33] Given the circumstances as explained earlier, it is safe and reasonable to say that the Federal Court must not have accepted this submission as despite these arguments and the reasons for how and why this letter from MPL came to pass, the Federal Court refused to grant leave to appeal and to revisit the earlier decision(s). In which case, the doctrine of *res judicata* is engaged. This material which the plaintiff seeks to adduce here was the very same material which the plaintiff pivoted and pitched its case in its application for leave at the Federal Court. Justice demands that there is finality in litigation and the courts have a responsibility to prevent abuse of its process by checking such actions as that presented today. As a principle of substantial justice, the principle of *res judicata* precludes all parties, not excepting the parties before the court today, from "re-agitating in subsequent proceedings a complaint or an issue that has ... been disposed in earlier proceedings between the same parties ... ". E F G

[34] Learned counsel for the plaintiff had contended that the plaintiff had no intention of impugning the judgment in the 2005 Suit. The letter is a 2013 letter and had just come into existence. The court ought to afford the plaintiff opportunity to canvass the implications of the letter at a proper trial and not strike the claim out *in limine*. H

[35] With respect, I disagree. From the facts as culled from the affidavits filed and from the submissions, it cannot be denied that the intention of the plaintiff is really to not only revisit but to impugn the decision in the 2005 Suit. It cannot lie in the face of I

the plaintiff to say that it only has the potential of affecting the decision when that is the very object of the whole exercise. After all, the very complaint of the plaintiff is about what it perceives as having to pay out twice; and the plaintiff wants to be alleviated from that order of the court.

[36] As pointed out earlier, the plaintiff had contended that it behooves on the court to adjudicate on the letter if its credulity was not in doubt; and its counsel had explained why there can be no doubt. However, as discussed, I am not satisfied as to whether the plaintiff has been diligent in procuring this letter. The properties were reinstated in 2004. This matter of whether the demolition notice had been retracted or withdrawn was already in the forefront of the plaintiff's case and under scrutiny of the court even in the 2005 Suit. Yet, the plaintiff did not see fit to procure that letter. In any case, the court in the 2005 Suit had rejected that contention when it found no evidence in support.

[37] Further, even if it is accepted that the letter is fresh evidence, which I do not, the conditions for fresh evidence are not satisfied. It is most pertinent to note that the letter in question does not seek to revoke the demolition notice with effect from the date of its issuance. It seeks to revoke the notice with immediate effect, that is, in June 2013. That being so, I cannot see how such a letter is evidence for the case at that point in time back in June 2003; or even as evidence that is relevant for consideration. If at all it is evidence, it is evidence of an action today though in relation to a document issued some ten years ago.

[38] For all these reasons, this is indeed a plain and obvious case which merits being struck out now. The plaintiff's case is obviously unsustainable and will be an abuse of process of court if allowed to proceed.

[39] Accordingly, the court is compelled to strike out the plaintiff's claim for the reasons put forth by the defendants. Enclosure (11) is therefore allowed; and encl. (5) is dismissed. Lastly, the plaintiff is to pay the defendants the sum of RM20,000 as costs.